No. 94-1837

In The

Supreme Court Of The United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA; FLORIDA DEPARTMENT OF INSURANCE; FLORIDA ASSOCIATION OF LIFE UNDERWRITERS; PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS BILL NELSON AND THE FLORIDA DEPARTMENT OF INSURANCE

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QUESTIONS PRESENTED

The Department is dissatisfied with the phrasing of the Questions Presented by Barnett, and submits its phrasing of the Questions Presented in the following order:

1. Whether Florida's Section 626.988, which prohibits insurance agents or solicitors associated or affiliated with financial institutions from engaging in insurance agency activities, is a law enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

2. Whether 12 U.S.C. Section 92 is an "Act [that] specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

3. Whether a federal statute that gives a national bank located and doing business in any place the population of which does not exceed 5,000 inhabitants, permission to sell insurance (12 U.S.C. § 92) preempts Florida's Section 626.988 in that it prohibits subsidiaries of bank holding companies from engaging in insurance agency activities.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following regulatory provision should be added to the four provisions contained in Barnett's brief:

5. The Comptroller of the Currency, Department of Treasury Interpretive Ruling, codified at 12 C.F.R. § 7.7100 (1995), provides:

> 12 U.S.C. 92 provides that national banks may act as agents for any fire, life, or other insurance company in any place the population of which does not exceed 5,000 inhabitants. This provision is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000 even though the principal office of such bank is located in a community whose population exceeds 5,000.

STATEMENT

Petitioner Barnett Bank of Marion County ("Barnett" or "the bank") is a subsidiary of the largest bank holding company headquartered in the state of Florida, and one of the largest bank holding companies in the southeastern United States. R. 3-62, pp. 1, 3, ¶¶ 5, 24, 25. The bank has its principal place of business in Ocala, Florida, but owns and operates a branch bank located in Belleview, Florida. R. 3-62, p. 1, ¶¶ 2, 3. On October 18, 1993, Barnett purchased Linda Clifford Insurance, Inc. ("LCI"), a general lines insurance agency operating in Belleview, Florida, a place of less than 5,000 inhabitants. Linda Clifford and the other agents employed by LCI then became employees of Barnett. R. 3-62, pp. 1, 2, ¶¶ 6-8.

I. Regulatory Background

A. Federal

The principle that regulation of insurance lies with the states was recognized by this Court in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868). The Court held that one of Virginia's insurance regulatory statutes did not violate either the Commerce Clause or the Privileges and Immunities Clause of the United States Constitution.

Seventy-five years later, in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Court upheld an Act of Congress regulating methods by which interstate insurance companies did business, thereby deciding that the Commerce Clause grants Congress the power to regulate interstate insurance transactions. Prior to 1944, Congress at no time attempted to control the business of insurance, as it was considered outside the Commerce Clause powers. Congress responded to *South-Eastern Underwriters* by passage of the McCarran-Ferguson Act, the second section of which provides that "[t]he business of insurance, and every person

engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(b).

B. Florida

For over twenty years Florida has prohibited its licensed insurance agents from engaging in "insurance agency activities" while they are "associated with ... or controlled by" a "financial institution" as those terms are defined in Section 626.988(1)and(2).[1] Excluded from this prohibition is "any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000." Fla. Stat. Ann. § 626.988(1)(a).

II. Barnett initiates litigation.

After purchase of LCI, Barnett sought a declaratory judgment from the United States District Court for the Middle District of Florida to allow the bank to market insurance to existing and potential customers, regardless of where located, from its branch office in Belleview, Florida. Barnett sued then Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance (collectively "the Department") on the theory that 12 U.S.C. § 92 preempted Sections 626.988(1)(a) and (2), Florida Statutes (1993), Pet. 3-5.

The Department issued an administrative Immediate Final Order (IFO) (R. 1-5, Ex. D), directing Linda Clifford and her associate insurance agents to cease and desist from insurance agency activities, other than the selling of credit life and credit disability insurance, which are exempted from the definition of "insurance agency activities." Fla. Stat. Ann. § 626.988(1)(b).

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[1] Section 626.988 is part of Florida's Unfair Insurance Trade Practices Act, which has as its stated purpose "to regulate the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub. L. No. 15, 79th Congress)..." i.e., the McCarran-Ferguson Act. *See Fla. Stat. Ann.* §626.951(1).

Barnett filed a motion for a temporary restraining order in the District Court seeking to enjoin the Department from enforcing the IFO.

III. The Federal District Court hears trial testimony as to the purpose of 626.988.

The District Court denied Barnett's motion for a temporary restraining order and set a bench trial. Barnett argued that Florida had placed a "precatory gloss" on Section 626.988 "by attaching labels and proffering expert testimony" designed to give the false impression that 626.988 is consumer protection legislation. R. 3-43, Mem. p. 7. This attack on the State's asserted purpose of Section 626.988 raised a significant factual issue: Whether Section 626.988 had actually been enacted and applied as consumer protection legislation. The Department argued that determination of that issue was essential to the trial court's proper resolution of the preemption issue. R. 3-60, p. 3.

Aside from a joint stipulation of facts filed by the parties (R. 3-62), the only evidence introduced at trial was by the Department through Donald A. Dowdell and Douglas A. Shropshire, two Senior Department officials most familiar with the purposes and current enforcement of Section 626.988. The bank's position at trial was: "We don't have any testimony to put on." (TR-4).

The purposes of Section 626.988, as determined by the Florida Legislature and Florida's trial and appellate courts, are to: (1) prevent coercion of insurance consumers through the express or implied force of credit; (2) prevent the undue concentration of economic resources; and (3) prevent unfair trade practices in the transaction of insurance. These three purposes can be found in the legislative history of the statute, case law, and from the Department's experience in administering Section 626.988 and related provisions.

The Department's experience has shown that the three purposes, acknowledged as valid in *Glendale Fed. Sav. & Loan Ass'n v. Dep't of Ins.*, 587 So.2d 534, 536 (Fla. 1st DCA 1991), rev. den., 599 So.2d 565, and *Production Credit Ass'n of Fla. v. Dep't of Ins.*, 356 So.2d 31 (Fla. 1st DCA 1978), are "real concerns." Mr. Shropshire testified, "yes, we absolutely found all three of those elements to be present dangers to policyholders and to the solvency of the company." (TR-81)

Addressing each concern individually, the Department's unrebutted testimony established that the danger of the inherent coercive power of credit is a well-recognized problem. Bank customers seeking, for example, an auto loan or home mortgage may be steered by bank employees to insurance products offered by the bank or through an insurance agency operating in association with the bank. The granting of the loan is then directly or indirectly tied to the purchase of insurance. Witness Shropshire testified that he has seen "convincing extensive evidence of an intentional business arrangement to mislead policy holders and prospective policy holders as to the nature of the product they were buying." (TR-77-78.)

Second, with regard to safeguarding solvency by preventing the undue concentration of economic resources, the Department's experience has shown that third-party interests who have access to large customer bases and the huge premium writings generated thereby, possess sufficient leverage to dictate financial decisions of insurers to such an extent that insurers may become insolvent as a result. (TR-25.)

This problem is not unique to agents operating in association with financial institutions. Similar concerns are addressed by Florida's producer-controlled insurer statute, the managing general agent law, and the holding company statute. All of these business relationships may lead to the problem of reverse competition, whereby vendors and lenders controlling large blocks of business dictate commission pricing to insurers dependent on

that cash flow. Instead of commission levels being driven by standard free-market pricing, insurers "leapfrog" each other, offering progressively higher commission levels to producers of large blocks of business. (TR-37-38.)

Florida's experience with credit life insurance, a product marketed through financial institutions and exempted from the prohibitions of Section 626.988, shows actual commission levels of eighty percent, leaving only twenty percent for the payment of claims. By way of comparison, health insurance and property and casualty insurance loss ratios are typically the exact opposite — administrative expenses are around thirty percent, leaving approximately seventy percent of premium dollars to pay claims. While Section 626.988 has generally served to limit such abuses by financial institutions in the marketing of insurance, the notable exceptions to the prohibitions of Section 626.988, credit life and credit disability insurance, are where Florida has encountered problems. (TR-36-38.)

Third, with regard to preventing unfair trade practices, the Department's unrebutted testimony established that recent Department investigations had revealed extensive evidence of intentional business arrangements whereby banks sought to mislead policyholders and prospective policyholders that the insurance product they were buying was a bank product. The product would be "dressed up" to appear as a bank investment when in reality the product was insurance sold by an insurance agency. Florida's elderly population is particularly susceptible to being thus misled. (See *Barnett*, 839 F.Supp. at 842, for the District Court's concurrence with the Department's concerns.) (TR-81-82.)

Department investigations revealed that when banks operate contrary to Section 626.988, it is not uncommon to find the bank utilizing its employees to solicit prospective policy-

holders. Section 626.988 prevents such unlicensed activities. (TR-79.)

IV. The District Court finds the Florida law was enacted for the purpose of regulating the business of insurance.

The District Court's order (Pet. App. at 26a-31a), answers the following inquiry:

> Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the State of Florida "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

(Pet. App. at 26a.) The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, insulates state laws from challenges of preemption under the Supremacy Clause when state laws are enacted for the purpose of regulating the business of insurance. Relying on trial testimony set forth above, express State legislative intent, two State appellate decisions, and guided by this Court's decisions in *United States Dep't of Treasury v. Fabe*, 508 U.S. __, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), and *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), the District Court held that Section 626.988 is a law enacted by the State of Florida for the purpose of regulating the business of insurance.

The District Court found the State's concerns to be legitimate in that the statute indirectly protects the relationship between insurer and insured by protecting the insurance-purchasing public. The Court found the law "furthers the interest" of the potential policyholding public, and therefore, is a "law enacted for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson. *Fabe*, 113 S.Ct. at 2208.

V. The District Court concluded that 12 U.S.C. § 92 is not "specifically related to the business of insurance."

After concluding from the evidence that Section 626.988 is a law enacted for the purpose of regulating the business of

insurance, the trial court determined the "effect, if any, of Section 92 of the Federal Reserve Act." *Barnett Banks of Marion County, N.A. v. Gallagher*, 839 F.Supp. 835, 842 (M.D. Fla. 1993). Pet. App. 32a. The Court noted that Barnett "has consistently stated and/or conceded that Section 92 is a "bank" law, and has premised its argument accordingly." *Barnett*, 839 F.Supp. at 839, Pet. App. 25a, n.3. The Court, relying on *Fabe*, 113 S.Ct. at 2211, looked to whether Section 92 "specifically requires" that a conflicting state statute yield. *Barnett*, 839 F.Supp. at 842, Pet. App. 32a. The District Court concluded "that § 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,' *Fabe*, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted." (Pet. App. at 35a). Finding that Florida's statute is saved from preemption as a result of the McCarran-Ferguson Act, the District Court entered an opinion and order denying Barnett any injunctive or declaratory relief. *Barnett*, 839 F.Supp. at 843, Pet. App. 35a-36a.

VI. The Court of Appeals for the Eleventh Circuit affirms.

The Eleventh Circuit affirmed after reviewing the District Court's fact findings for clear error, noting "none of the parties allege[d] the trial court erred in its fact-finding." *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631, 634 (11th Cir. 1995), Pet. App. 7a. Accepting the uncontradicted evidence that Section 626.988 was enacted for the protection of Florida policyholders, the Eleventh Circuit applied this Court's "relationship" test in *Fabe*, as taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460. *Barnett*, 43 F.3d at 635, Pet. App. 10a.

Upon a *de novo* review of the record, including state court interpretations of the statute, the unrebutted testimony of the Department's witnesses, reference in the Florida Statute to McCarran-Ferguson and this Court's explicit instruction in *Nat'l Securities* and *Fabe*, the Eleventh Circuit concluded that

Section 626.988 regulates the business of insurance because it protects policyholders. 43 F.3d at 636, Pet. App. 12a-13a.

The Eleventh Circuit then reviewed Section 92 and concluded that Section 92 "neither 'specifically relates to the business of insurance,' 15 U.S.C. 1012(b), nor 'specifically requires' *Fabe*, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted." 43 F.3d at 637, Pet. App. 15a. "[U]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interest of policyholders." *Fabe*, 113 S.Ct. at 2208. 43 F.3d at 636, Pet. App. 15a.

SUMMARY OF ARGUMENT

The Court should affirm the decisions of the lower Federal courts and find that the State of Florida has lawfully prohibited insurance agent employees of Barnett from transacting insurance at the Belleview, Florida branch office.

Regulation of the business of insurance is a legitimate, traditional role of the states. The Florida Legislature can best enact an insurance regulatory scheme that addresses Florida's unique insurance and demographic needs. Limitations on the circumstances under which licensed agents may transact insurance are fully consistent with legitimate state interests. Congress recognized that state regulation of insurance is in the public interest by enacting the McCarran-Ferguson Act and creating a "reverse preemption" doctrine for insurance regulation. Congress thus reserved to the states the regulation of the business of insurance.

Section 626.988, contained in Part X of the Unfair Trade Practices section of the Florida Insurance Code, is fully consistent with the McCarran-Ferguson Act's protection of legitimate State interests. The purpose of the statute has been extensively examined in Florida courts, and in the federal courts below. It has been consistently found to regulate an essential part of the

business of insurance — the relationship between insurers and policyholders.

The District Court and the Eleventh Circuit Court of Appeals properly relied on extensive State jurisprudence and uncontroverted expert testimony regarding the statute's goals of preventing coercion, unfair trade practices, and the undue concentration of resources. Recent Florida administrative cases confirm the real world problems which arise when tie-in arrangements occur between banks and insurance agents. Regulation of the point-of-sale transaction between the agent and the consumer is clearly at the heart of the business of insurance.

The lower courts correctly determined that Section 92 of the Federal Reserve Act does not specifically relate to the business of insurance so as to preempt Section 626.988. Section 92, which travels with the other provisions of the 1916 amendment of the Federal Reserve Act, relates to the business of banking.

In the 1916 amendments to the Federal Reserve Act, including Section 92, Congress intended to regulate banks and not insurance. Indeed, it was not until 1944 that a federal role in insurance regulation was even contemplated. Furthermore, even if Section 92 involves insurance, it does not specifically relate to the business of insurance as required by this Court in *Fabe*.

This Court has recently confirmed that Section 92 is part of the Federal Reserve Act, based on an extensive review of the subject matter and location of the statute. Federal and state courts have consistently found that Section 92 does not specifically relate to the business of insurance and was enacted as a banking law.

McCarran-Ferguson's "reverse-preemption" doctrine effectively imposes a "clear-statement" rule applicable to federal statutes which might otherwise preempt contrary state laws.

Section 92 fails to have the preemptive power required to reinstate its supremacy over a Florida law which would otherwise be "exempt" from preemption as a law which regulates the business of insurance.

As to Issue III, the Department adopts the traditional preemption argument set out fully in the Brief of the Florida Association of Life Underwriters, et al.

In sum, Barnett is asking this Court to recreate history. Barnett's entire case is based on its disbelief of the Department's uncontroverted expert testimony at trial and the findings of lower federal courts, state courts and administrative hearing officers. Barnett did not attempt to put on a single witness or introduce even one exhibit at trial. After losing in the courts below, Barnett's strategy is to convince this Court to disregard the existing record—a record of uncontradicted testimony, state legislative intent, Congressional intent, departmental expertise, actual experience in Florida, and State and Federal cases squarely on point. This Court, upon review of the record, will conclude that the weight and persuasiveness of the evidence cannot be disregarded.

ARGUMENT

I. The District Court And The Eleventh Circuit Correctly Found That Section 626.988 Is A Law Enacted "For The Purpose Of Regulating The Business Of Insurance" Under The McCarran-Ferguson Act.

A. McCarran-Ferguson Act Overview

Congress, through enactment of the McCarran-Ferguson Act, has principally reserved to the states regulation of the business of insurance. It is well-settled that there is a strong presumption against imputing to Congress an intention to preempt an area that traditionally has been left to State regulation. *Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1962). The "business of insurance" is such an area. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 480 (1946).

Section 1012 of McCarran-Ferguson Act provides in part as follows:

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law *enacted by any State for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law. (emphasis supplied).

Barnett attempts to reargue the congressional intent underlying McCarran-Ferguson. However, this Court in *Prudential v. Benjamin* has already obviated the need for such an analysis noting:

> It is not necessary to spend much time with interpreting the McCarran Act. Pertinently it is as follows:
>
> * * *
>
> Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. One was by removing obstructions which might be thought to flow from its own power, *whether dormant or exercised*, except as otherwise expressly provided in the Act itself or in future legislation.

* * *

> Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-430 (1946) (emphasis added). *See also Western and Southern Life Ins. Co. v. Bd. of Equalization of Calif.*, 451 U.S. 648 (1981); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

State laws which regulate the relationship between insurer and policyholder are laws regulating the business of insurance. In *SEC v. Nat'l Securities, Inc.*, *supra*, this Court explained what types of state laws fell within McCarran-Ferguson's ambit of protection:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was — *it was on the relationship between the insurance company and the policyholder*. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance'.

393 U.S. at 459-60 (emphasis added).

Barnett contends that the test of whether a state law regulates the "business of insurance", and is thus entitled to McCarran-Ferguson protections is governed by *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). However, *Pireno* established a three-part test to determine whether insurer activity is subject to antitrust scrutiny. The *Pireno* test is not applicable to analysis of whether a state law is enacted "for the purpose of" regulating the business of insurance. This Court recently addressed this point in *United States Dep't of Treasury v. Fabe*, *supra*, 113 S.Ct. 2202, 2211.

The Court in *Fabe* distinguished between the first clause of Section 2(b) which exempts those state laws from preemption which were "enacted . . . for the *purpose* of regulating the business of insurance, from the second clause which exempts only "the business of insurance" from federal antitrust laws." *Id.* at 2209. This Court therefore limited the reach of *Pireno* to determining the scope of an insurer's antitrust immunity under McCarran-Ferguson, stating:

> Both *Royal Drug* and *Pireno*, moreover, involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* clause, which is not so narrowly circumscribed. The language of § 2(b) is unambiguous: the first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Id.

Using the *National Securities* test for determining whether a state law was "enacted for the purpose of regulating the business of insurance" under the first clause of McCarran-Ferguson, and limiting the *Pireno* test of the "business of insurance" to antitrust